

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)	
FOR REVIEW BY:)	CHARGE NO.: 2009CF1417
	EEOC NO.: 21BA90376
SILVIA HERNANDEZ,)	ALS NO.: 09-0708
Petitioner.)	

ORDER

This matter coming before the Commission by a panel of three, Commissioners Sakhawat Hussain, M.D., Spencer Leak, Sr., and Rozanne Ronen, presiding, upon Silvia Hernandez's (the "Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Respondent")¹ of Charge No. 2009CF1417; and the Commission having reviewed all pleadings filed in accordance with 56 Ill. Admin. Code, Ch. XI, Subpt. D, § 5300.400, and the Commission being fully advised upon the premises;

NOW, THEREFORE, it is hereby **ORDERED** that:

- (1) The Respondent's dismissal of Count A of the Petitioner's charge is **VACATED**, and Count A of the charge is **REINSTATED** and **REMANDED** to the Respondent for **FURTHER INVESTIGATION**; and
- (2) The Respondent's dismissal of Count B and Count C of the Petitioner's charge is **SUSTAINED** for **LACK OF SUBSTANTIAL EVIDENCE**.

In support of which determination the Commission states the following findings of fact and reasons:

1. The Petitioner filed a charge of discrimination with the Respondent on November 12, 2008, in which the Petitioner alleged Post Press Production, Inc. ("Employer") subjected the Petitioner to unequal wages from July 2008 through October 29, 2008, because of the Petitioner's physical disability, amputated finger on the left hand (Count A); that on October 29, 2008, the Employer denied the Petitioner a reasonable accommodation for her disability (Count B), and that the Employer discharged the Petitioner on October 29, 2008, because of the Petitioner's disability (Count C). On November 23, 2009, the Respondent dismissed the Petitioner's charge for Lack of Substantial Evidence. On December 9, 2009, the Petitioner filed this timely Request.

¹ In a Request for Review Proceeding, the Illinois Department of Human Rights is the "Respondent." The party to the underlying charge who is requesting review of the Department's action shall be referred to as the "Petitioner."

2. The Employer is a printing company. On June 1, 2008, a staffing company assigned the Petitioner to work for the Employer as a temporary employee, and specifically as a machine operator. The Petitioner earned \$ 7.75 at the Employer.
3. The Petitioner had previously become disabled in 2001 following a work injury. On July 18, 2008, the Employer became aware of the Petitioner's disability.
4. In July 18, 2008, the Petitioner began experiencing pain in her hand due to her disability. Between July 18, 2008, and September 12, 2008, the Petitioner's physician sent notes to the Employer. The notes indicated the Petitioner had a 10 to 15 pound weight restriction on her left hand due to her disability. On each occasion that the Employer received medical documentation from the Petitioner's physician, the Employer accommodated the Petitioner's disability by assigning her light tasks.
5. The last doctor's note sent by the Petitioner's physician to the Employer was dated September 12, 2008. The note indicated the Petitioner still had a 10-15 pound weight restriction on her left hand. The note also stated that there would be a follow-up to assess the Petitioner's condition in one month.
6. One month later, by mid-October 2008, neither the Petitioner nor her physician had submitted additional medical documentation to the Employer recommending the Petitioner remain on restricted duty.
7. On October 28, 2008, the Petitioner was reassigned to a regular work load, to operate one of the Employer's machines. The Petitioner worked a full shift. On October 29, 2008, the Petitioner returned to work and again began to operate a machine. However, the Petitioner left after working only a half-day. The Petitioner states the material she was assigned to lift on October 29, 2008, was very heavy and exceeded her work restrictions.
8. On October 30, 2008, the Petitioner called the Employer to determine if there was any work for her. The Employer informed the Petitioner that the only work available was that which required lifting heavy materials. The Petitioner did not return to work at the Employer.
9. The Petitioner now alleges the Employer subjected her to unequal wages, alleging that non-disabled employees who performed the same work as she did earned \$ 8.00 per hour, to her \$7.75 per hour. The Petitioner further alleges the Employer failed to reasonably accommodate her disability on October 29, 2008, when it assigned the Petitioner work exceeding her alleged medical restrictions, and that the Employer discharged the Petitioner on October 29, 2008, because of the Petitioner's disability.
10. In her Request, the Petitioner argues a former employee of the Employer was aware of the Petitioner's disability, and that this former employee told the Petitioner that she was receiving a

lower wage. The Petitioner states the Employer was aware of the Petitioner's disability in July 2008, and that non-disabled employees received higher paying positions, positions for which the Petitioner was equally qualified.

11. In its response, the Respondent asks the Commission to vacate the dismissal of Count A of the charge and to remand Count A of the charge to the Respondent for further investigation. Therefore, the Respondent does not oppose the Petitioner's Request as to Count A.
12. However, the Respondent asks the Commission to sustain the dismissal of Count B and Count C of the charge for lack of substantial evidence. As to Count B, the Respondent argues there is no substantial evidence to support a *prima facie* case of failure to accommodate. The Respondent argues that pursuant to 56 Ill. Admin. Code, Ch. II § 2500.40(c), the Petitioner had an affirmative duty to request an accommodation for her disability. The Respondent found no substantial evidence the Petitioner, or her physician, had requested a reasonable accommodation past mid-October 2008. As to Count C, the Respondent argues there is no substantial evidence to support a *prima facie* case of discharge based on disability because there was no evidence the Respondent had discharged the Petitioner.

Conclusion

The Commission's review of the Respondent's investigation file leads it to conclude that the Respondent properly dismissed Count B and Count C of the Petitioner's charge for lack of substantial evidence. If no substantial evidence of discrimination exists after the Respondent's investigation of a charge, the charge must be dismissed. See 775 ILCS 5/7A-102(D). Substantial evidence exists when the evidence is such that a reasonable mind would find the evidence sufficient to support a conclusion. See In re Request for Review of John L. Schroeder, IHRC, Charge No. 1993CA2747, * 2 (March 7, 1995)(1995 WL 793258).

As to Count B, it is correct that the Petitioner has the burden of showing she made a request for a reasonable accommodation to the Employer on October 29, 2008. However, there is no substantial evidence the Petitioner requested the Employer accommodate her disability beyond mid-October 2008. According to the Petitioner's doctor's note of September 12, 2008, the Petitioner's condition was going to be assessed after 30 days. The Commission finds it was reasonable for the Employer to have concluded the restrictions and accommodations requested in the September 12, 2008, doctor's note would expire after 30 days. Therefore, because there is no substantial evidence the Petitioner requested a reasonable accommodation following the expiration of the September 12, 2008, work restrictions, there is no substantial evidence the Employer failed to provide the Petitioner with a reasonable accommodation for her disability on October 29, 2008.

As to Count C, there is no substantial evidence the Employer discharged the Petitioner, and hence no substantial evidence the Employer discharged the Petitioner because of her disability on October 29, 2008. Rather, once the Petitioner learned the only work available at the Employer was that which involved lifting heavy materials, the Petitioner did not return to the Employer.

The Respondent does ask the Commission to vacate the dismissal of Count A of the charge so that it may continue to investigate the Petitioner's unequal wages claim. Finding that the Respondent does not oppose the Petitioner's Request as to Count A of the charge, the Commission herein vacates the Respondent's dismissal of Count A, and remands Count A of the charge to the Respondent for further investigation.

THEREFORE, IT IS HEREBY ORDERED THAT:

- (1) The Respondent's dismissal of Count A of the Petitioner's charge is **VACATED**, and Count A of the charge is **REINSTATED** and **REMANDED** to the Respondent for **FURTHER INVESTIGATION**; and,
- (2) The Respondent's dismissal of Count B and Count C of the Petitioner's charge is **SUSTAINED** for **LACK OF SUBSTANTIAL EVIDENCE**.

This Order is not yet final and appealable.

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

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Entered this 23rd day of June 2010.

Commissioner Sakhawat Hussain

Commissioner Spencer Leak, Sr.

Commissioner Rozanne Ronen